Filed 11/16/10 Ghervescu v. Wells Fargo Home Mortgage CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RADU GHERVESCU,

Plaintiff and Appellant,

v.

WELLS FARGO HOME MORTGAGE, INC. et al.,

Defendants and Respondents.

E048925

(Super.Ct.No. SCVSS111016)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed.

Martin & McCormick, John D. Martin and Kathy J. McCormick for Plaintiff and Appellant.

Keeney Waite & Stevens and E. Ludlow Keeney, Jr., for Defendant and Respondent Michael D. Holley.

Barrett Daffin Frappier Treder & Weiss and Edward A. Treder for Defendants and Respondents Wells Fargo Home Mortgage et al.

This appeal is taken from an amended judgment entered after we affirmed the original judgment in part and remanded the cause for further proceedings. (*Ghervescu v. Wells Fargo Home Mortgage* (Mar. 13, 2008, E041809) [nonpub. opn.] (*Ghervescu I*).)[1]

In the original action, plaintiff Radu Ghervescu sought to set aside a foreclosure sale on property he owned in Lake Arrowhead, or in the alternative, to obtain an award of damages for breach of contract. At the conclusion of the trial, he sought to amend his complaint to conform to proof at trial, to allege an additional cause of action for negligent misrepresentation as to the date of the foreclosure sale—which, he contends, caused him to delay obtaining available funds to cure the delinquency, resulting in the sale of his property—and a cause of action for wrongful foreclosure based on alleged violations of federal regulations in connection with the foreclosure. The court denied the motion to amend the complaint and entered judgment for the defendants on all causes of action.

In the first appeal in this matter, we affirmed the judgment as to all causes of action pleaded in plaintiff's complaint. However, because we concluded that the trial court abused its discretion by denying the motion to amend the complaint, we remanded for further proceedings on the two proposed causes of action. We directed the court to amend the complaint according to proof and to resolve several issues based on the evidence adduced at the trial. (*Ghervescu I*, *supra*, E041809 [at pp. 15-16].) This appeal is from the amended judgment entered following the proceedings on remand.

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[1] We take judicial notice of the record in *Ghervescu I*. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

PROCEDURAL AND FACTUAL HISTORY

The following facts are taken from our opinion in *Ghervescu I*:

Wells Fargo Home Mortgage, Inc. (Wells Fargo) is the servicer of plaintiff's mortgage loan for a residential property in Lake Arrowhead. The beneficiary under the deed of trust is General Electric Mortgage Services, Inc., which is not a party to this litigation. Defendant Loanstar Mortgagee Services, L.L.C. (Loanstar) is the successor trustee under the deed of trust. The loan was insured by the Federal Housing Administration.

In May 2002, plaintiff fell into arrears on his loan payments. In October 2002, plaintiff and Wells Fargo entered into a forbearance agreement. According to the terms of the agreement, plaintiff was required to make a partial reinstatement payment in the amount of $1,427.15 on or before November 5, 2002. If the payment was received on or before that date, Wells Fargo would instruct its foreclosure counsel to suspend foreclosure proceedings. If plaintiff made all of the payments due under the agreement, Wells Fargo would instruct its counsel to dismiss foreclosure proceedings.

Wells Fargo instructed Loanstar via e-mail on October 3, 2002, to put the foreclosure on hold. It executed the forbearance agreement on October 18, 2002. On October 21, 2002, Wells Fargo instructed Loanstar to proceed with the notice of default but to put the foreclosure on hold. Loanstar recorded a notice of default on October 22, 2002, but it did not put the foreclosure on hold. The confusion apparently arose because plaintiff had also requested a loan modification plan, which was denied around the same time the repayment plan under the forbearance agreement was approved. When plaintiff received the notice of default in November, he called Wells Fargo to inquire about it. He was told it was an error and that he could ignore it.

On November 18, 2002, plaintiff remitted his first payment. However, the payment was due on November 5. His December payment was also late. When he called Wells Fargo in January to advise that his January payment would be late as well, Wells Fargo told him that his forbearance agreement had been terminated because of the late payments. He was told that he could apply for a new forbearance agreement. Plaintiff applied for a new forbearance agreement on January 13, 2003. During January and February, plaintiff called Wells Fargo several times to follow up. He was never told that the application had been denied. On January 21, 2003, Wells Fargo prepared a letter denying the application. Plaintiff did not receive it; he first saw it at his deposition in January 2004.

On January 23, 2003, plaintiff called Wells Fargo to inquire about the application. He was not told that the application had been denied. However, he was told that if the application was not approved, the trustee's sale could be held no earlier than May 4, 2003, thus giving him ample time to "make arrangements," i.e., to cure the default and reinstate the loan. Plaintiff continued to inquire about the forbearance application. He also asked Wells Fargo to calculate the total amount he would owe if the forbearance application were denied and began making arrangements to obtain the funds to reinstate if necessary.

On March 31, 2003, when plaintiff called Wells Fargo again to follow up on the pending application, he was told that the trustee's sale had been held on March 27, 2003. Defendant and cross-complainant Michael Holley was the buyer. In a bench trial, the court rendered judgment for defendants Wells Fargo and Loanstar and dismissed Holley's cross-complaint as moot. (*Ghervescu I*, *supra*, E041809 [at pp. 2-4].)

On remand following the first appeal, the trial court resolved the issues against plaintiff and entered judgment for defendants. Plaintiff filed a timely notice of appeal.

LEGAL ANALYSIS

THE JUDGMENT ON THE NEGLIGENT MISREPRESENTATION CAUSE OF ACTION IS SUPPORTED BY THE TRIAL COURT'S CREDIBILITY DETERMINATION

An action for negligent misrepresentation lies where one who supplies information for business purposes in the course of a business or profession misrepresents a past or existing material fact, without reasonable grounds for believing it to be true, and with intent to induce another's reliance on the fact misrepresented. In order to prevail, the plaintiff must prove that he was ignorant of the truth and that he justifiably relied on the misrepresentation and suffered damages as a result. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 & fn. 4; *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolap Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1154-1155.) A justifiable decision to refrain from an action, based on the other party's misrepresentation of a material fact, will satisfy the element of reliance. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 174.)

In the original trial, the trial court found that plaintiff's reliance on Wells Fargo's representation as to the sale date was unreasonable because "'[t]he ultimate responsibility for the conduct of the sale process itself laid [*sic*] in the hands of the trustee not the beneficiary. [Thus], [i]t seems that the most accurate information pertaining to such a sale date would best be known by the trustee and not Wells Fargo.'" (*Ghervescu I*, *supra*, E041809 [at pp. 7-8].) We held that this was error because the beneficiary rather than the trustee has control over the sale process. We remanded with directions to determine whether the evidence establishes that plaintiff justifiably relied on Wells Fargo's misrepresentation as to the sale date. (*Id.* [at pp. 8-9].)

It was undisputed that a representative of Wells Fargo told plaintiff, on January 23, 2003, that the earliest date the property would be sold was May 4, 2003, and that plaintiff therefore had time to "make arrangements," i.e., to cure the default. Plaintiff argued that he justifiably relied on that representation and, believing he had time, did not immediately seek to obtain funds to cure the default. He testified, however, that he had a portion of the money needed, and his friend George Moghadam testified that he would have been willing and able to supply the necessary funds if plaintiff had asked him to do so.

On remand, the trial court concluded that plaintiff's evidence that he had some funds available and could have borrowed the rest from Moghadam lacked credibility.

The court also found that plaintiff failed to exercise reasonable diligence. It found that plaintiff failed to retrieve his mail or visit the property and was thus unaware of the multiple notices of the pending March 27, 2003, trustee sale which Wells Fargo mailed to plaintiff and posted on the property.[2] It found that plaintiff's failure to take "even minimally reasonable measures to stay informed about [the] property" constituted a failure to exercise reasonable diligence, as did his failure take any "proactive steps" to cure the default, such as asking his friend for the money he needed to cure the default.

Plaintiff contends that the trial court failed to make findings which were consistent with our directions in *Ghervescu I* and contends that the evidence at trial supports only the conclusion that he justifiably relied on the representation as to the sale date. He contends that he had no duty to exercise diligence to discover that the sale was actually set for an earlier date.

We agree with plaintiff that the trial court's determination that plaintiff's own negligence in not monitoring his mail outweighed any negligence on Wells Fargo's part in misrepresenting what the court called the "estimated sale date of May 4, 2003"[3] is not a proper basis for determining whether plaintiff met his burden of proof on the claim of

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[2] Plaintiff testified that between the date he was told that the sale could not take place before May 4, 2003, and the date he learned that the sale had taken place, he was not collecting his mail at his address of record, a post office box, because he was ill and staying with a friend in Los Angeles. For the same reason, he did not visit the property.

[3] As plaintiff points out, Wells Fargo's representative testified at trial that its records showed that plaintiff was told that May 4, 2003, was the *earliest* date on which the sale could take place. There was no evidence that he was ever told that the date was merely an estimate.

negligent misrepresentation: The defense of contributory or comparative negligence does not apply to the tort of negligent misrepresentation. (*Carroll v. Gava* (1979) 98 Cal.App.3d 892, 897; accord, *Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 728.) Rather, the question is whether plaintiff justifiably relied on the misrepresentation. (*Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th at p. 1239 & fn. 4; see also *Garcia v. Superior Court* (1990) 50 Cal.3d 728, 757 (dis. opn. of Mosk, J.) [in tort of negligent misrepresentation, defense of comparative or contributory negligence is replaced by element of justifiable misrepresentation].)

Reliance is justified if the circumstances were such as to make it reasonable for the plaintiff to accept the defendant's statements without an independent inquiry or investigation. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864.) Recovery is barred only if the plaintiff's conduct was "'manifestly unreasonable in the light of his own intelligence or information. It must appear that he put faith in representations that were "preposterous" or "shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth." [Citation.] Even in case of a mere negligent misrepresentation, a plaintiff is not barred unless his conduct, in the light of his own information and intelligence, is preposterous and irrational. [Citation.]'" (*Id*. at p. 865.)

Here, the trial court made no determination that plaintiff's failure to monitor his mail after having been told that the sale could not take place before May 4, 2003, was preposterous and irrational. We cannot say that it was preposterous and irrational as a matter of law. (See *Boeken v. Phillip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1667 [holding that smoker's reliance on misrepresentations of tobacco company rather than warnings of Surgeon General may have represented "wishful thinking or naivete," but that his reliance was not unjustifiable as a matter of law].) Consequently, we cannot affirm the judgment on that basis.

Wells Fargo contends that the judgment must nevertheless be upheld because, even if plaintiff's initial reliance on the misrepresentation was justified, its subsequent efforts to inform plaintiff of the actual sale date discharged its duty to remedy the misunderstanding. It cites no authority for that contention, and we reject it. Just as the trial court did, this contention imposes a duty on plaintiff to remain vigilant "just in case" Wells Fargo's original representation was not reliable. However, as we have stated above, plaintiff's negligence is *not* a defense to a tort of either intentional or negligent misrepresentation. (*Shapiro v. Prudential Property & Casualty Co.*, *supra*, 52 Cal.App.4th at p. 728.) If plaintiff was entitled to rely on the statement when it was made, he had no duty to continue to investigate its reliability. As it was colorfully stated in *Ashburn v. Miller* (1958) 161 Cal.App.2d 71, "It does not lie in [the] mouth" of one who has misrepresented a material fact to say that the plaintiff should *not* have trusted him. (*Id.* at p. 80.) """Where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case no duty rests upon him to employ such means of knowledge. . . . It is said not to be just that a man who deceives another should be permitted to say to him, 'You ought not to believe or trust me,' or 'You are yourself guilty of negligence.'" [Citation.]' [Citations.]" (*Id*. at p. 81.) Although it would certainly have been more prudent for plaintiff to monitor his mail, any negligence on his part does not absolve Wells Fargo of responsibility for its misrepresentation to plaintiff.

Nor is Wells Fargo excused because, under normal circumstances, there is no requirement that a lender ensure that the property owner receives actual notice of a foreclosure sale. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 88-89.) Plaintiff's complaint is not that Wells Fargo failed to provide notice as required by statute; his complaint is that he was told that the sale could not take place before a certain date. Where the lender has previously represented to an owner that the sale cannot take place before a certain date, merely mailing and posting notices that the sale will take place on an earlier date without ensuring that the owner actually receives timely notice of the new sale date is not sufficient to avoid liability for the misrepresentation.

In any event, the judgment must be upheld based on the trial court's finding that plaintiff failed to prove that he could have cured the default if he had been aware of the March 27, 2003, sale date. "The tort of negligent misrepresentation does not require scienter or intent to defraud, but it does, of course, require a showing of resulting damage. [Citations.]" (*Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364.) "'Assuming . . . a claimant's [justifiable] reliance on the actionable misrepresentation, no liability attaches if the damages sustained were otherwise inevitable or due to unrelated causes.' [Citation.]" (*Id.* at p. 365, italics omitted.) The trial court dismissed plaintiff's evidence that he could have cured the default if he had learned of the accelerated sale date as not credible, based on its assessment of plaintiff's and Moghadam's demeanor as well as the content of their testimony. The court was "not persuaded that Plaintiff ever had the true financial ability to reinstate his defaulted loans . . . much less cure the defaults." The court went on to discuss the history of plaintiff's defaults and attempts to cure, and concluded that plaintiff failed to prove that his damages were the result of Wells Fargo's conduct rather than his own impecunity.

Credibility determinations are strictly the province of the trier of fact. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) The trier of fact is free to disbelieve and reject the testimony of witnesses even though they are uncontradicted and unimpeached. (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 242-243, overruled on other grounds in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 287.)[4] Even though a different trier of fact might have believed the testimony of plaintiff and Moghadam, the trial court did not. Accordingly, even if we assume that plaintiff justifiably relied on Wells Fargo's representation that the

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[4] "The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression. Did plaintiff and her mother testify with the conviction and assurance compatible with truthfulness; or did either of them give testimony haltingly as though laboring under the handicap of apprehension and uncertainty or did either of them give it glibly as though a tale learned by rote for the purposes of the courtroom? These are questions which can only be answered by the trier of fact. The court having seen and heard the parties may well have concluded that there was collusion; that the plaintiff's testimony was a fabric of fancy and exaggeration woven to lift her from bonds now distasteful; and that the testimony of plaintiff's mother was a recital of rehearsed evidence." (*Maslow v. Maslow*, *supra*, 117 Cal.App.2d at p. 243.)

sale could not take place before May 4, 2003, we must accept the trial court's conclusion that plaintiff failed to prove that his damages were proximately caused by his reliance on Wells Fargo's misrepresentation.

PLAINTIFF'S CLAIM FOR UNFAIR FORECLOSURE IS MOOT

Plaintiff contends that the trial court failed to apply the law of the case when it determined that he failed to meet his burden of proof regarding Wells Fargo's alleged violations of federal regulations pertaining to the servicing of home loans and to mandatory loss-mitigation procedures, as we directed in *Ghervescu I*. However, these contentions have been rendered moot by events which took place after we issued our opinion in *Ghervescu I*.

In *Ghervescu I*, we held that a property owner facing a nonjudicial foreclosure may assert a lender's failure to apply loss-mitigation regulations promulgated by the United States Department of Housing and Urban Development (HUD) or the Federal Housing Administration (FHA) defensively, "either to preclude or to set aside a foreclosure sale. Where no sale has taken place, a court may preclude the sale until the lender complies with the FHA's loss mitigation procedures. Or, if the sale has taken place, the court may set the sale aside if the lender's conduct is sufficiently egregious as to render the sale inequitable, unless the buyer is a bona fide purchaser who is entitled to the presumption that the sale was conducted regularly and properly. [Fn. omitted.]" (*Ghervescu I, supra*, E041809 [at pp. 12-13].)

We went on to explain that "Civil Code section 2924 provides that if the trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly. The presumption is conclusive as to a bona fide purchaser. (Civ. Code, § 2924; *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831.) [¶] A nonjudicial foreclosure sale is not completed until the deed has been transferred to the buyer, however. When the deed has not been transferred, the sale may be successfully challenged, regardless of whether the buyer is a bona fide purchaser, if there has been a procedural irregularity in the sale. (*6 Angels, Inc. v. Stuart-Wright Mortgage, Inc*. (2001) 85 Cal.App.4th 1279, [1286].)[5] Here, the preliminary injunction precluded delivery of the trustee's deed to Mr. Holley. The injunction remains in effect pending this appeal. Because the sale is not yet complete, the conclusive presumption does not apply." (*Ghervescu I, supra*, E041809 [at p. 13, fn. 7].)

As plaintiff acknowledges, the preliminary injunction which prohibited delivery of the trustee's deed to Michael Holley was dissolved as part of the original judgment in this matter, and the stay which was in effect during the prior appeal and the subsequent trial court proceedings was dissolved upon entry of the amended judgment. On August 7, 2009, we denied plaintiff's petition for a writ of supersedeas. The trustee's deed was

[5] In *Ghervescu I*, we incorrectly cited to page 1285.

delivered to Holley and was recorded on August 11, 2009. Consequently, the sale has now been completed and cannot be set aside. [6]

Plaintiff contends that the sale may nevertheless be set aside because Holley is not a bona fide purchaser. A bona fide purchaser, or BFP, is one who pays value for the property without notice of any asserted adverse interest or of any irregularity in the sale proceedings. (*Melendrez v. D & I Investment, Inc.*, *supra*, 127 Cal.App.4th at pp. 1250, 1251.) Plaintiff contends that Holley is not a BFP because Holley has had knowledge of plaintiff's claims since April 2, 2003, when plaintiff obtained the order restraining delivery of the deed. He contends a buyer cannot be a BFP when the sale has been disputed from the beginning. However, the sale was *not* disputed from the beginning.

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[6] We grant Holley's request for judicial notice of the trial court's order expunging the lis pendens recorded by plaintiff and of the recorded trustee's deed. (Evid. Code, § 452, subds. (c), (d), (g); *Lockhart v. MVM, Inc.* (2009) 175 Cal.App.4th 1452, 1460-1461 [grant deed is proper subject of judicial notice].) The deed contains the recitations which are required as a prerequisite to the conclusive presumption provided for in Civil Code section 2924.

We note that in *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, the court stated that "Section 2924's conclusive presumption language for BFP's applies only to challenges to statutory compliance with respect to default and sales notices." (*Id.* at p. 1256, fn. 26.) The court declined to follow authorities, including those we relied upon in *Ghervescu I*, which have held that the conclusive presumption provided for in Civil Code section 2924 applies to any challenge to the validity of a foreclosure sale. (*Melendrez*, at p. 1256, fn. 26.) *Melendrez* may or may not be correct on this point; it is contrary to the weight of authority, however. In any event, because our remand order in *Ghervescu I* was based on the conclusion that the sale could still be set aside because the conclusive presumption had not yet arisen (see *Moeller v. Lien*, *supra*, 25 Cal.App.4th at p. 832), it is law of the case that the presumption applies. (*Olson v. Cory* (1983) 35 Cal.3d 390, 399 [law of case applies to point not explicitly decided but implicitly decided because it was essential to the decision].) Consequently, the delivery of the trustee's deed is dispositive.

Holley purchased the property on March 27, 2003. Plaintiff did not learn of the sale until March 31, 2003, according to his complaint (which was filed on April 2, 2003), and Holley only learned of the dispute when he was served with the complaint and the temporary restraining order. Thus, he was a BFP at the time he paid for the property. That the sale remained voidable does not divest him of his status as a BFP. (See *Moeller v. Lien*, *supra*, 25 Cal.App.4th at p. 832 [sale to BFP may be set aside for procedural irregularity if deed has not been delivered]; *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.*, *supra*, 85 Cal.App.4th at p. 1286 [same].) Plaintiff has not provided us with any authority to the contrary.[7]

In the alternative, plaintiff asks for an award of damages against Wells Fargo for the alleged violations of the FHA/HUD regulations. He appears to assume that damages are an available remedy and does not provide any authority or argument which would support that conclusion.

We did not address that question in *Ghervescu I*, except to note that there did not appear to be any California case law on the subject and that "the weight of current authority in other jurisdictions holds that although the regulations do not provide for a private cause of action for damages, violations by lenders . . . can be raised as an equitable defense in a foreclosure action. [Citations.]" (*Ghervescu I*, *supra*, E041809 [at

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[7] At oral argument, plaintiff cited *Melendrez v. D & I Investment, Inc.*, *supra*, 127 Cal.App.4th at page 1256, footnote 26, in support of this contention. Footnote 26, however, does not state that a buyer who qualifies as a BFP may lose that status if the sale is disputed after he has tendered payment. Rather, in footnote 26, the court discusses only the conclusive presumption applicable to BFP's, as discussed *ante*.

p. 11].) Plaintiff has not provided any authority or argument that the regulations do provide for a private cause of action for damages. An appellant has the burden of demonstrating a legal basis for his claims. "Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, disapproved on another point in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3.) Accordingly, we decline to address plaintiff's request for damages.

DISPOSITION

The judgment is affirmed. Wells Fargo, Loanstar and Michael Holley are to recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ Richli
J.